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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable William H. Alsup, Judge

Huawei Technologies Co, Ltd,)
et al,)
)
Plaintiffs,)
)
)
VS.) NO. 16-CV-2787
)
)
Samsung Electronics Co, Ltd,)
et al,)
)
Defendants.)
)

San Francisco, California
Wednesday, March 14, 2018

TRANSCRIPT OF PROCEEDINGS

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Reported By: Vicki Eastvold, RMR, CRR

1 Wednesday - March 14, 2018

2 P R O C E E D I N G S

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5 **THE CLERK:** Calling civil matter 16-CR-2787, Huawei
6 Technologies Company, Limited, et al, versus Samsung
7 Electronics Company, Limited, et al. Counsel, please come
8 forward and state your appearance.

9

10 **MR. PRITIKIN:** Good afternoon, Your Honor. David
11 Pritikin on behalf of Huawei. And with me is Michael
12 Bettinger, Matt Love and Irene Yang.

13 **THE COURT:** Good afternoon.

14 **MR. VERHOEVEN:** Good afternoon, Your Honor. Charles
15 Verhoeven, Quinn Emanuel, on behalf of Samsung. And with me is
16 Victoria Maroulis, Sam Stake and Thomas Pease. We also have a
17 number of people from Samsung in attendance today (indicating).

18 **THE COURT:** Wonderful. Glad you're here. Welcome.

19 All right. Please sit down. Finished my four-month long
20 trial and I had some bandwidth to go back and take a look at
21 this case. And so I want to be corrected on things that I
22 don't quite get before I get to the motion which I think is
23 actually simpler. I think what's harder is what happens at the
end of the day.

24 But so as I understand it, the trial in this case is going
25 to include whether each of the patents is valid, enforceable,

1 infringed and essential.

2 **MR. VERHOEVEN:** Correct.

3 **THE COURT:** And then we'll get to whether either party
4 breached its FRAND commitments.

5 **MR. VERHOEVEN:** Correct.

6 **THE COURT:** And then we get to what the remedies are;
7 whether there's injunctive relief or not, certainly. And then
8 the question that I'll have, and it's not totally germane to --
9 it's somewhat germane to this motion but not totally -- to the
10 question of damages and how that works, if at all.

11 But so that's the shape of my mind going into this motion.
12 It does seem to me that the *Gallo* test applies. And that the
13 parties are the same. The issues are essentially the same,
14 which is is Huawei entitled to an injunction or not. And the
15 Chinese patents, as I understand it, are substantially similar
16 to the ones here. And the issue of contract interpretation
17 with the FRAND commitments is here before me.

18 With respect to the *Unterweser* factors, U.S. courts hold
19 that owners of declared essential patents that have made
20 commitment to SSO's should be precluded from getting injunctive
21 relief. There are exceptions to that, but that's something
22 that I think I need to make the determination on rather than a
23 foreign court.

24 I don't think what Huawei's done is particularly
25 vexatious, but I do think that the decision in Shenzhen would

1 frustrate my ability to adjudicate the issue.

2 And given the timing, I'm not sure -- I don't see a
3 significant impact on comity. We're going to go to trial in
4 December. And the Chinese case is on appeal. And the
5 injunction as to Huawei is opposed to the court. So that's the
6 way that I'm looking at this motion. So I'm inclined to grant
7 it.

8 But Mr. Pritikin, go ahead and untangle me if I'm tangled
9 up somewhere.

10 **MR. PRITIKIN:** Well, I think I can, Your Honor. I
11 will try. I have a slide --

12 **THE COURT:** I'm shocked. Seems like I can never get
13 away from any patent motion at all without a slide deck.

14 **MR. PRITIKIN:** I tried to keep this one as skinny as
15 possible. I'm not going to go through them all, Your Honor.

16 But I think the point of confusion here -- and I think
17 it's generated in part by the reply brief that was filed -- is
18 the nature of what is happening in China. And I'd like to
19 focus on that because that's central to the question of whether
20 an anti-suit injunction would be appropriate and it
21 differentiates this from the *Microsoft* case. So I want to
22 start with that.

23 And in the deck that I gave you we can turn to slide
24 three. And it was a little hard to piece all of this together,
25 I'll grant you that, from the briefs the Court had. But I

1 tried to put together a timeline so the Court would understand
2 what was happening in Shenzhen.

3 As you can see on the top there, Huawei filed its
4 complaint in May of 2016. And Samsung filed its own complaints
5 just a couple of months afterward. And they're the same thing.
6 They were suing on Chinese patents seeking only injunctive
7 relief in China. And then the lawsuit that is the basis of the
8 anti-suit injunction motion before the Court was filed in this
9 court in August of 2016, after these Chinese cases seeking
10 injunctions were already in the works and in progress.

11 And there are a couple of points that are noteworthy here.

12 First, the Chinese patent cases, while the Chinese patents
13 are counterparts of the U.S. patents, they're not the same.
14 You cannot enforce a Chinese patent in the United States or
15 vice versa. And so China is the only place one can get relief
16 on a Chinese patent. And it's very common in patent litigation
17 for parties to assert the foreign counterparts in foreign
18 countries because that's the only remedy that exists.

19 Second, the fact that Samsung itself brought its patent
20 cases in China before counterclaiming in this court, seeking an
21 injunction there, confirms the propriety of seeking those
22 injunctions in China.

23 Both parties did it. They did it without reservation.
24 They sought it. And, in fact, while the first of the cases,
25 the two of the Huawei patent cases have gone to trial,

1 similarly one of the Samsung cases has gone to trial in China.
2 We're awaiting the decision. It hasn't been decided yet. But
3 the FRAND issues were presented there.

4 And so that's the lay of the land in terms of the timing
5 on it.

6 Now, if we go to the next slide, the U.S. -- this lawsuit,
7 and the Chinese case were filed simultaneously. And there's a
8 lot of confusion generated in their briefs where they say first
9 filed, first filed, later filed. Not so. The cases were filed
10 at the same time. China's a day ahead of us and that's why
11 there are different dates. May 25 versus May 24. But these
12 cases were filed at the same time. Not like *Microsoft* where
13 somebody months later did an end run around the U.S. case.

14 If we go to the next slide, slide five, and this is an
15 important point and it's getting to the heart of the issue.
16 And that is that the FRAND issues were submitted to the court
17 in Shenzhen. And Samsung acknowledged that in its opening
18 brief, and I've quoted that on the slide here. That Huawei
19 asked the Shenzhen court to resolve whether its licensing
20 efforts with respect to its Chinese SEP's were FRAND. Huawei
21 was up front about this. They told the court, We want an
22 injunction, but we have to have complied with FRAND to do it
23 and we're putting that issue before you.

24 And I think that Samsung understood that that was fatal to
25 the anti-suit injunction here because that issue was put to the

1 foreign court, the question of compliance with FRAND. Unlike
2 *Microsoft* where Motorola had gone off to Germany and it
3 procured an injunction in a circumstance where the FRAND issues
4 could not be tested as a predicate to issuing an injunction
5 there. Just the opposite in this case.

6 And they backtracked on that in their reply brief, which
7 is quoted below here, where they said the court had no reason
8 in China to conduct a rigorous FRAND analysis because Huawei
9 did not ask for one. Well, these statements are directly
10 inconsistent. They got it right the first time.

11 So what happened in China? If we go to slide six -- now,
12 they made the statement throughout their briefs, and it was
13 repeated over and over and over again, that the Chinese court
14 had not ruled on the FRAND issues. And this is very important
15 because it bears on all the Gallo factors whether it's
16 vexatious litigation on comity.

17 In truth, the Shenzhen court did conduct a thorough and
18 searching and detailed FRAND analysis before issuing the
19 injunction.

20 On slide six what I've included here is just sort of an
21 overview of what is in that opinion. 209 pages. 210 pages.
22 They supplied it to the court, a translation of it, and it's in
23 the record here. And when one goes through it one can see
24 contrary to the representations that were made by Samsung that
25 the court didn't consider FRAND and just blindly issued this

1 injunction as it happened in Germany in the *Microsoft* case, not
2 so.

3 In this case there was a very thorough analysis of it, of
4 all aspects of FRAND, before the court issued the injunction in
5 China.

6 On slide seven I've summarized the type of evidence that
7 was in the record. There was fact testimony. There was expert
8 testimony. Samsung actually got leave from the court to call
9 fact witnesses to testify about the negotiations. In the end
10 they decided not to call them and they relied on experts. But
11 they put in long expert declarations on the FRAND issues. Then
12 most importantly, and this bears on the present motion, on
13 slides eight and nine the court made findings as to compliance
14 with FRAND.

15 And so on slide eight I pulled out the quotes from the
16 court's opinion with respect to Huawei's conduct. And that
17 Huawei had complied with FRAND, which is a predicate for
18 issuing an injunction on SEP's. That's the issue they say,
19 Well, it wasn't decided; we have to have our day in court in
20 the United States. They had their day in court in China, and
21 the court concluded before issuing the injunction that Huawei
22 had complied.

23 Now, they said in their brief that these findings are
24 nebulous. They're not nebulous at all. All you have to do is
25 pick up the 210-page opinion and read it. They're detailed,

1 they're thorough, they're precise.

2 They said the court never analyzed Huawei's offers to see
3 if they complied with FRAND. Not true. If you look at it, it
4 says the quotations made by Huawei as the holder of SEP's to
5 Samsung, including the license rate and license fee of each
6 phone had complied with FRAND principles. These are in the
7 conclusions after the court has analyzed all of the evidence.

8 And they looked at the kinds of things the courts look at
9 in the United States in analyzing FRAND. They look at
10 comparable licenses, they look at percentage of the standard
11 essential patents that the companies had. All of the same kind
12 of evidence that U.S. courts look at in deciding it.

13 If we turn to slide nine, the findings with respect to
14 Samsung were scathing. The court found that Samsung has
15 obvious fault and obviously went against FRAND principles.
16 They found that they seriously delayed the negotiations and
17 clearly violated FRAND principles. They found that Samsung's
18 subjective fault of maliciously delaying the negotiations in
19 violation of FRAND principles. And in the conclusions they
20 found that they obviously deviated from the relative portfolio
21 strengths of them. And then the last sentence there is where
22 it is summed up.

23 What did they do? They say it's nebulous. It's not
24 nebulous. It's clear and precise. They say it's a hometown
25 court. Well, no dispute that, of course. Huawei is a Chinese

1 company. But there's nothing in the record to suggest that
2 this wasn't a fair proceeding that was held over there. And
3 the complaint they have at the end of the day is that they
4 lost.

5 The court concluded that they had violated their FRAND
6 obligations, that Huawei had complied with them, which is the
7 predicate. It is the absolute predicate for getting an
8 injunction.

9 Now, contrary to what they've said, under U.S. law -- and
10 this is recited in our briefs in a number of places, but the --
11 and I've got it on one of the slides here -- but the -- under
12 U.S. law, there is no bar to getting an injunction on standard
13 essential patents if you've complied with the FRAND obligations
14 against an unwilling licensee, which is precisely what the
15 court in China found before issuing that injunction.

16 Now, why is this so important to the anti-suit injunction
17 motion? It's because it cuts across the board and undermines
18 all of the *Gallo* factors that they're relying on here.

19 In terms of the posturing of the two cases, the issue has
20 been put before the Chinese court and decided. And all they
21 want -- this is a collateral attack on the judgment of the
22 court. This is not an anti-suit injunction. They don't like
23 it. They were unhappy with the result. They'll take their
24 appeal over there, maybe they'll win and maybe they won't. But
25 if you get an unfavorable decision in a fair proceeding, one

1 that they're not complaining about, the remedy you have is to
2 appeal it to the local court. It's not collaterally to come in
3 and say, Oh, we want the chance to litigate that again in the
4 United States and maybe we'll get something that is more to our
5 liking there.

6 That is not what the *Gallo* test and that's not what the
7 *Unterweser* factors go to.

8 **THE COURT:** Should I not care at all about Samsung's
9 argument that if the injunction goes forward it's going to have
10 to shut down its plant and it's going to be put in this
11 untenable negotiating position? Is that just tough crackers
12 because a court in China made that determination?

13 **MR. PRITIKIN:** The Court has to look at irreparable
14 injury. I'll grant you that. But that's not irreparable
15 injury that they're facing there. Because they have an easy
16 way to avoid that. It's very easy. It's in their control.

17 First, they lost the case. When you lose a lawsuit there
18 are consequences to it. And, I mean, if it's not a
19 fundamentally unfair case, I mean, that's what happens when you
20 lose the case over there.

21 But beyond that, they know that if they either would make
22 FRAND offers -- and they aren't. This is classic holdout where
23 they just years and years it's rope-a-dope where they just come
24 at us, come at us. Okay, sue us on a patent. We don't care.
25 We'll lose a patent. So what. We'll pay you small damages on

1 the patent we lose on. And then they never want to enter into
2 a license agreement.

3 And Huawei said, What we want is a cross-license on FRAND
4 terms both ways. And we're not going to dictate it. So very
5 easy for them to avoid the consequences of this. All they have
6 to do is say, Fine, we'll let a third-party, a neutral, a true
7 neutral third-party, set the FRAND rates both ways.

8 There's not going to be an injunction that would go into
9 effect. We said we're not going to enforce an injunction. But
10 this is more of the holdout strategy. If they can fend off any
11 day of reckoning and force Huawei to litigate patent by patent
12 knowing that the results on any individual patent aren't going
13 to move the needle very much, they're never going to enter into
14 a cross-license with Huawei. And they know that at the end of
15 the day they're going to be -- very likely they're going to be
16 the payor because their volume of products is so much greater
17 than ours.

18 **THE COURT:** So now I want to make you deviate a little
19 bit from this argument to the thing that I've been thinking
20 about, Mr. Verhoeven. I know you're going to have a reaction
21 to this, but --

22 In this case, I framed -- I framed the case the way that I
23 understand it. When I get to the infringed patents, the
24 potentially infringed patents, and I get to the remedy, I'm
25 going to be -- in other patent cases I've had experts come and

1 say, you know, There is no way that these companies would enter
2 into a license for one patent. They would demand a worldwide
3 patent. They would demand -- you know, and isn't that -- you
4 know, Mr. Bettinger's been arguing from the first time I met
5 him that this --

6 **MR. VERHOEVEN:** Verhoeven.

7 **THE COURT:** What?

8 **MR. VERHOEVEN:** Verhoeven.

9 **THE COURT:** Bettinger.

10 **MR. VERHOEVEN:** Oh, I'm sorry.

11 **THE COURT:** That that's what I needed to do in this
12 case, and wanted to bifurcate the issues so that I'd do that
13 first.

14 I agreed with Samsung that I needed to look at the patents
15 first. But at the end of the day, aren't I going to have to
16 deal with that as a damages issue anyway? And if that's true,
17 is there really great harm to Huawei's position if you wait
18 until the trial of this case?

19 **MR. PRITIKIN:** Yeah, well there is harm, Your Honor.
20 Because there are patent rights in China that have been fully
21 and fairly litigated. And the FRAND defenses have been
22 adjudicated. So it's not as though that's never been heard.
23 So there is harm in not allowing that to go forward. And it's
24 a tremendous comity problem unlike *Microsoft* where there had
25 been an unfair proceeding over there in Germany.

1 But to come back to the landscape for this case. Let me
2 address that.

3 First, I think you're right in terms of the individual
4 patents, and I think we've been saying that from the beginning.
5 Both sides have asserted patents in this case. And there are
6 limits. I mean, there are only going to be five claims, so
7 let's say five patents that go to trial. They both have
8 portfolios with very large numbers of them.

9 The damages on an individual patent typically don't amount
10 to a great deal in the scheme of things with companies of this
11 size. And that's -- I don't want to say it's inconsequential,
12 but isn't really where the fight is on the damages for the
13 individual patents. It's on the rights to practice them. If
14 somebody is adjudicated to be, as Samsung was in China, an
15 unwilling licensee and someone who's violated their FRAND
16 commitments, the Court in the United States, just as in China,
17 would have the power to issue an injunction against them which
18 presumably then would lead to a negotiation of a global
19 license.

20 As far as how this case would play out, the damages as
21 such would be the damages on the individual patents. Now,
22 there are claims both ways for breach of the FRAND obligations,
23 and presumably there could be damages that would arise from
24 that.

25 We have asked the Court in a declaratory judgment action

1 to set a FRAND rate and, you know, we'd be fine with the Court
2 setting a FRAND rate for the United States, I mean, that would
3 -- clearly that is within the power and authority of the Court
4 to do it under the contract. They say you can't do it.

5 And so, I mean, it's more rope-a-dope. Because their view
6 of the world is all we can do in this courtroom is adjudicate
7 these five patents, and then we go home, and then years later
8 we go on. There's no license and no resolution and no
9 conclusion to any of this.

10 And our view all along has been that if this Court would
11 at least in the declaratory judgment action set a rate in the
12 United States for the value of these portfolios, we would have
13 that in front of us. It would be a basis for concluding the
14 case. And we know that Judge Selna set the rate in a case
15 recently; in the *TCL* case that got a lot of notoriety. Judge
16 Robart did it in the *Microsoft* case. Of course, in the
17 *Microsoft* case, Microsoft had committed to accept that rate and
18 the parties agreed to it. That's the other reason why it was
19 so egregious that Motorola had gone off and tried to do an
20 independent run around the court.

21 Here there's nothing of the sort. All we have on their
22 side, as I say, is rope-a-dope. Don't issue the injunction,
23 don't set a rate for the United States court --

24 **THE COURT:** They've been very consistent.

25 **MR. PRITIKIN:** Well, it has and it hasn't. Because

1 I've got a slide here that contrasts that with the positions in
2 the current motion which are not entirely consistent. Now they
3 have a little more expanded view of what Your Honor can do.

4 **THE COURT:** I get the irony. So let's close it up
5 because I don't think I can keep Mr. Verhoeven from talking for
6 much longer.

7 **MR. PRITIKIN:** So, I mean, the bottom line for us,
8 Your Honor, is that we do not believe that the *Gallo* test is
9 met here. This case is very different from *Microsoft*. And
10 fundamentally the fact those FRAND issues were decided in China
11 is an important point of distinction and one that raises, we
12 think, very, very serious comity issues. Because they are
13 asking this Court to essentially nullify a ruling they didn't
14 like and they got in China.

15 And it's a pretty drastic step for a court to take. You
16 know, is the court of appeals over there going to affirm? I
17 don't know. I think so. I mean, I would hope so. But right
18 now, you know, they've acquiesced in this procedure. They
19 brought their own patent injunction actions in China and
20 they've tried them and they're waiting for their decision on
21 it. So hard-pressed for them to say there's something
22 fundamentally wrong with that and run in now and try to nullify
23 it after they get a decision they don't like.

24 **THE COURT:** Thank you.

25 Mr. Verhoeven.

1 **MR. VERHOEVEN:** Thank you, Your Honor. I'll to keep
2 this brief. What you just heard in part was classic holdup and
3 coercion. What you just heard counsel say is, Oh, these
4 injunctions, shutting down your manufacturing facilities, all
5 these terrible things that they don't really dispute will
6 happen because it's an SEP patent, which means by definition
7 you need it to practice the protocol to make phones. They've
8 got an injunction on two out of thousands. And they say -- and
9 you asked him, Well, what's the -- well, what about this harm?
10 What was their answer? All they need to do is agree to our
11 terms. All they need to do is agree that a third-party can
12 decide all of this stuff.

13 That's classic admitted coercion. That's what's going on
14 in this case. Both sides have asked Your Honor to decide
15 issues that would be dispositive with respect to FRAND, with
16 respect to breach of contract issues, that go to the heart of
17 whether an injunction's appropriate.

18 The U.S. counterparts to these patents are at issue in
19 this case. But yet they proceed with wanting to enforce this
20 injunction. And they say in their brief, opposition at page
21 two. "All Samsung needs to do to end all the patent cases is
22 agree to a third-party, be it an arbitration panel or this
23 Court, will set true FRAND rights for both sides portfolios."

24 Well, we have a dispute about that.

25 **THE COURT:** Well, you've had a dispute for a long time

1 that your client doesn't seem to be wrestling to the -- trying
2 to wrestle to the ground. And instead we have these 25
3 lawsuits in the United States and China.

4 How is this going to -- where does this end,
5 Mr. Verhoeven?

6 **MR. VERHOEVEN:** Well, let me just address -- it ends
7 with this case with this Court's decision. And the Court has
8 put it all together in a trial, which is the right thing to do.
9 And it will get all resolved in December. Maybe some
10 post-trial remedy motions.

11 But, you know, there was -- we were tainted here by
12 saying, Well, you filed injunction actions in China, too.
13 Well, we did that defensively because of what had happened
14 already, which is their filing injunction actions in China. We
15 needed something to defend ourselves. We said on the face of
16 those complaints that we're only doing it defensively. And if
17 -- if -- you know, they will agree not to enjoin us then we'll
18 drop the whole thing.

19 And I'm here -- I'll represent to you, Your Honor, if you
20 grant this anti-suit injunction motion we will not attempt to
21 enforce any injunction we might get in China before this case
22 is finally resolved. That's not why we're doing it in China.
23 We're not trying to extort anything. We're trying to save
24 ourselves from extortion by getting some sort of leverage if,
25 in fact, this injunction motion was -- anti-suit injunction

1 motion was denied and we're facing the prospect of having to
2 shut down all of our manufacturing facilities in China. We
3 have no choice.

4 But the notion that we're doing the same thing they're
5 doing, and that we're trying to extort them or -- that's a
6 strong word -- to coerce them, Your Honor -- is simply not
7 true. And I think my representation takes care of that. We
8 will not endeavor to enforce an injunction in China if you
9 grant this motion until there's a final ruling in this court.

10 So we heard a lot about the FRAND was decided in China
11 and, therefore, it -- you shouldn't -- you should defer to
12 China. Well, first of all, that's a circular argument. I
13 disagree whether it was fairly decided or not; but it's a
14 circular argument.

15 They asked this Court, and we asked this Court on
16 declaratory relief, to rule on whether there's a breach of
17 contract violation of FRAND. Both parties agreed on the choice
18 of law, by the way. Law that was not applied in China. And so
19 what they're coming back and saying is you should -- they even
20 say you're collaterally estopped. They're saying you should
21 not rule -- you should not enjoin them and allow sort of
22 inconsistent rulings of the same thing, when they've come here
23 and asked for this ruling from this Court. And their
24 justification is, Well, China ruled. And, therefore, they're
25 justified in doing coercion. And holdup.

1 That doesn't carry any water. The Chinese court system,
2 as Your Honor I'm sure knows, is antithetical to the
3 United States judicial system. It's an inquisitorial judicial
4 system where the judge is -- *sua sponte* will ask for witnesses,
5 ask for things, be the investigator. And there's no due
6 process requirements like they are in this country. The judge
7 goes and will talk to one side without the other side being
8 allowed to be there. There's all kinds of differences.

9 I'm not casting aspersions on the Chinese system, I'm just
10 saying it's completely different from the U.S. system. Our
11 system is an adversarial system. It's set up in a completely
12 different manner. We have a right to a jury trial in this
13 country. We have a right to have counsel present at all times
14 in this country, which was not the case in the Chinese action.

15 So there's -- the notion that there's a full and fair
16 FRAND determination is factually incorrect. In fact, the
17 Chinese order didn't even analyze and address the relative
18 value of the portfolios.

19 They talked about it in their -- in their summary of what
20 happened, but they made no findings about any of that stuff.
21 All they did was say, Samsung's a bad company. Therefore,
22 they're not -- they violated FRAND. It's completely different
23 than what the U.S. courts have done in these sorts of
24 situations in the analysis the U.S. courts have done.

25 So I'll also note that there wasn't a cause of action for

1 breach of contract in China. The only relief sought in these
2 Chinese actions, these two patents, was an injunction. That's
3 it. And the court issued its injunction. That was the remedy.

4 Now, let's talk about FRAND for a second, all right?

5 Under ETSI, which is a governing doctrine here, your FRAND
6 obligation applies to each IPR. Each patent. And before you
7 get an injunction on even an individual patent, you have to
8 show that you made a FRAND offer. It's a duty on the part of
9 the patentee. The patentee doesn't make a FRAND offer on that
10 IPR, then under U.S. policy and U.S. case law they can't get an
11 injunction.

12 Well, what happened in China on these two patents? Suit
13 was filed before any offer on the two patents was made.
14 Period. To this date, no offer has been made on those two
15 patents. Period.

16 The only relief sought in China was an injunction. They
17 didn't even seek a FRAND damages amount. So if we're going
18 talk about FRAND in the course of conduct of the parties and
19 we're looking at China, under the U.S. analysis per se not
20 FRAND what they're doing. They didn't even offer to say, Hey,
21 we'll -- look, we've got these potential injunctions, we're
22 asking for injunctions, pay us X. Which they're required to
23 do.

24 And then they're saying, Well, the court made a big FRAND
25 determination. All the court did was to look at parties'

1 offers back and forth on a global license. Made no findings
2 about the relative strengths of the portfolios or all the other
3 factors that a court here would do. And simply said, Ah, you
4 know, they're not FRAND because they're evil.

5 And one of the things that I found telling -- if I could
6 find it, Your Honor -- is in its ruling on January 11 where
7 they issued the injunction the court states, quote -- this is
8 the Chinese court -- "Considering that the patent in this case
9 is a 4G SEP, the issue of ceasing infringement is different
10 from that of a non-SEP. After the court's decision to order
11 the defendants to cease their infringement goes into effect,
12 Huawei and Samsung can still conduct cross-licensing
13 negotiations with respect to standard essential patents."

14 They've adopted the coercive strategy that Huawei is
15 engaged in. They've acknowledged if they issued an injunction
16 it's going to kill the whole product because these are SEP's.
17 They've said, We're going to issue the injunction, and maybe
18 you guys should talk about it, something bigger, some big
19 global license.

20 Well, that is an adoption by the Chinese court of holdup,
21 of coercion. So the notion that there's a full and fair
22 opportunity for us in China is simply not justified, not
23 correct. The notion that we are attempting to do the same
24 thing in China is not correct.

25 And if you look at the admitted statements, the express

1 statements, repeatedly in the brief -- and I can go through --
2 there's six places in their opposition where they say, All you
3 need to do is agree to what we want to do. All you need to do
4 is agree to a third-party setting a whole license.

5 And as you know from the very first hearing, Your Honor,
6 when I came up and said that doesn't make any sense, these
7 agreements are ten years long, people have to make business
8 judgments about what technology is going to be important and
9 what technology is not going to be important. And I went on
10 and on about that. And I believe Your Honor responded that you
11 thought it was silly for the parties to try and use the courts
12 to negotiate these sorts of --

13 **THE COURT:** I don't think I said that. But I think I
14 said that I needed to deal with the patents that were in front
15 of me. But I still have -- I still have my question. Which is
16 at the end of this trial, what's your view about remedies? How
17 this case all ends. And how you get some certainty with
18 respect to the amounts that may be owed with respect to this
19 patent. How is that going to happen?

20 **MR. VERHOEVEN:** Well, number one, what Your Honor said
21 previously I 100 percent agree with. The counterparts are in
22 this case of those two patents. Your Honor's going to do an
23 analysis, or the jury, of the prerequisites to remedy which
24 need to happen first. Got to put the horse in front of the
25 cart, not the cart in front of the horse. And breach of

1 contract based on these negotiations both parties have sought
2 declaratory relief on, Your Honor. There's going to be a jury
3 ruling on that. And then you're going to get to the issue of
4 remedy.

5 Now, it could be that remedy is moot. The jury could say,
6 Neither side was FRAND. Go home. Or the jury could say, Both
7 sides were FRAND and acting in good faith. Both sides were
8 FRAND and acting in good faith. Then we know that injunctions
9 aren't appropriate, right? At least on the patents we're
10 looking at in this case.

11 And I think that all of those sorts of rulings will
12 resolve this case, will resolve whether injunctions are
13 appropriate in China or not. Again, we're not asking this
14 Court to say whether injunctions in China are appropriate or
15 not. We're asking this Court to rule on what Huawei asked the
16 Court to do, what we asked the Court to do, in a fair way that
17 doesn't get frustrated by coercive holdup by enforcement of
18 these Chinese injunctions.

19 And this is a temporary request. It's like an injunction
20 request that would end at final judgment in this case; or at
21 some other point if the Court decides it's at the point where
22 it can modify or vacate what it said. But it's not a long-term
23 request. We're not asking to even stay China or anything.
24 They can keep going. They take their appeal. They do whatever
25 they want. We're asking as a private party given what they've

1 done in this jurisdiction and what they've asked for in this
2 jurisdiction, that the Court order that they not take actions
3 to shut down our plants until after the December trial.

4 And it's not a huge request.

5 **THE COURT:** There is something to Mr. Pritikin's
6 argument that people who lose cases face results as a result of
7 losing cases. So these -- all of these cases -- both sides
8 have embarked on a litigation strategy that your clients
9 obviously think is consistent with their best interest. It
10 doesn't seem to me that it is. But that's -- I don't get to
11 make those calls.

12 **MR. VERHOEVEN:** We did not initiate litigation, Your
13 Honor.

14 **THE COURT:** There is a strategy that you have with
15 respect to -- both sides do.

16 So, anyway, I appreciate your argument, Mr. Verhoeven.

17 **MR. PRITIKIN:** May I respond briefly to these points?
18 I'll just take them one by one.

19 The argument that this is classic holdup? Wrong. Holdup
20 is where you take my terms or I'll enjoin you. Not our
21 position. Our position is you can, sure, make us a FRAND
22 offer. We think ours is FRAND, but we'll submit it to a
23 third-party to decide. That isn't holdup. No court has ever
24 characterized anything like that as holdup.

25 Second. How does this case end? It doesn't under their

1 view. It just doesn't end. I mean, there's no result of this
2 case that will result in a determination of even the United
3 States portfolio. Their view is all the Court has the power to
4 do is decide these patents one by one. In fact, if -- I'm not
5 going to pull it up now, but Your Honor can look at our slide
6 13 where we quote language that they -- previous statements
7 they've made to the court where they've said, You can't even
8 determine the breach of FRAND unless you first adjudicate
9 patent by patent whether the patent is valid and infringed and
10 essential and the like. Then it goes -- it's a path to
11 nowhere.

12 Third, they -- we have put before this Court a claim for
13 breach of their FRAND obligation. And we did that because
14 that's going to be a predicate to getting injunctions in the
15 United States. So we did have to put that issue before the
16 Court in order to get an injunction here.

17 Mr. Verhoeven went on and on about a lack of due process.
18 None of that is in the record. There is nothing in the record
19 here to suggest there is anything flawed with the Chinese
20 proceedings.

21 And then he made statements about how -- I mean, I kind of
22 wonder if people have actually read the opinion. I mean,
23 statements that they never evaluated the portfolio strength.
24 And I would refer Mr. Verhoeven and the Court to pages 104 to
25 120 where there's a detailed analysis of the portfolio

1 strengths as assessed by various third parties. And it goes
2 through it in considerable detail.

3 And then the final point he made was that we've never made
4 an offer on the two patents that are in the Chinese case and
5 that it's somehow per se a violation of U.S. antitrust law or
6 FRAND principles not to have done that.

7 There's nothing in the law like that. What the law
8 requires is that you have to give them a chance to take a FRAND
9 license to your portfolio, which we've done, and it's
10 documented in here that the offer complied with FRAND. There's
11 no law that one has to give an offer specifically on the
12 individual patents. I mean, they've never done it with respect
13 to the individual patents in this court.

14 And so, you know, we submit that what ought to happen here
15 is that these legal actions have consequences; the parties are
16 going to battle it out. It's in their control. They can put
17 an end to it by finding a way to have a third-party set these
18 royalties. Let's have a third-party set the royalty outside
19 the U.S. We'll agree to it. Any neutral third-party. Let's
20 have a third-party do it in the United States. This Court
21 could do it. And that would be the end of the matter. It
22 would cut through it. We may not like the results then. Third
23 party may think our patents aren't as good as we think they
24 are. But that's not holdup. That is fundamental fairness and
25 that's the way these disputes get resolved. Lots of precedence

1 for it.

2 **THE COURT:** Mr. Verhoeven, last word?

3 **MR. VERHOEVEN:** Three points. Number one, the
4 statement was made that the law requires that you offer a
5 portfolio license or the law -- he characterized the law as
6 talking about an aggregate license and offering an aggregate
7 license.

8 There's no law that says that at all. The law talks about
9 specific IPRs. And ETSI talks about specific IPRs and your
10 duty to give a FRAND offer. I'm not saying that the parties in
11 real life don't talk about aggregate portfolios; but the
12 statement was made that under the law all you have to do is
13 make an aggregate portfolio offer, and if you don't like it
14 then you can pick a patent, a single patent, or two patents,
15 and shut down the other side's whole manufacturing system on
16 the grounds that you made an aggregate license offer but didn't
17 even make an offer on the two patents you're suing on. The law
18 is dead to the contrary.

19 Number two, they're saying there's no holdup. What
20 counsel said to you is, They can either take our offer or --
21 which is holdup -- or they can agree to this disputed issue
22 that you're going to resolve that a third-party --

23 **THE COURT:** What they're saying, Mr. Verhoeven, is
24 consistent with what they've said from the beginning. Which is
25 they think that Samsung is non-negotiating with them in good

1 faith. And so they want to have a process that you would --
2 that Samsung would agree to that was a neutral process instead
3 of having just -- having somebody who doesn't want to do what
4 they want to do.

5 Holdup, I think, is something different. I understand
6 what your point is. But they're not trying to cram -- what
7 they're trying to cram down your throat is some sort of level
8 table where you negotiate in good faith and reach a resolution.
9 And if you can't do that, have somebody adjudicate it for you
10 because it's a waste of time, and courts, and resources to keep
11 doing what you're doing. That's what they're saying.

12 **MR. VERHOEVEN:** Well, that's what they're saying. But
13 for all the reasons I said in the very first hearing, there's
14 significant prejudice for us to have some third-party, who's a
15 layperson, who hasn't been practicing in the industry, set all
16 these complicated terms. And we, from the beginning of this
17 case, said we don't want to do it. Your Honor's going to
18 decide, because they've put it in front of Your Honor, who wins
19 on that.

20 And my point is by enforcing these injunctions and saying,
21 We'll drop them if you just agree to it, they're frustrating
22 the adjudicatory process before Your Honor for Your Honor to
23 decide that instead of us having to raise a white flag and say
24 --

25 **THE COURT:** Not the only thing that's frustrating me.

1 What's your third point?

2 **MR. VERHOEVEN:** I think that was it, Your Honor.

3 **THE COURT:** Okay. All right. Well, thank you for
4 your argument. I think this is a really interesting issue.
5 And you've obviously -- this case will undoubtedly produce lots
6 of brain damage before it's all done.

7 But thank you for being here and I'll see you again.

8 **MR. PRITIKIN:** Thank you, Your Honor.

9 **MR. VERHOEVEN:** Thank you, Your Honor.

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3 **CERTIFICATE OF REPORTER**

4 I certify that the foregoing is a correct transcript
5 from the record of proceedings in the above-entitled matter.
6

7 DATE: March 16, 2018.
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10 //Vicki Eastvold
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12 Vicki Eastvold, RMR, CRR, U.S. Court Reporter
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